

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

|                      |              |                            |
|----------------------|--------------|----------------------------|
| John Swon,           |              | NOTICE OF DETERMINATION OF |
|                      | Complainant, | PRIMA FACIE VIOLATION      |
| vs.                  |              | AND                        |
| Minnesota DFL Party, |              | NOTICE OF AND ORDER FOR    |
|                      | Respondent.  | PROBABLE CAUSE HEARING     |

**TO: John Swon, [Street Address Redacted], Edina, MN 55435; Minnesota DFL Party, 255 E. Plato Boulevard, St. Paul, MN 55107.**

On October 27, 2008, John Swon filed a Campaign Complaint with the Office of Administrative Hearings alleging that the Minnesota DFL Party violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material concerning Representative Jan Schneider. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a prima facie violation of Minn. Stat. § 211B.06.

**THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN** that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **1:30 p.m. on October 31, 2008**. The hearing will be held by call-in telephone conference. You must call: **1-888-566-4893** at that time. When the system asks for your numeric pass code, enter **"12000"** on your phone and you will be connected to the conference. The probable cause hearing will be conducted pursuant to Minnesota Statutes § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at [www.oah.state.mn.us](http://www.oah.state.mn.us) and [www.revisor.leg.state.mn.us](http://www.revisor.leg.state.mn.us).

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be emailed to Judge Mihalchick at [Steve.Mihalchick@state.mn.us](mailto:Steve.Mihalchick@state.mn.us) or faxed to 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary

hearings are conducted pursuant to Minnesota Statutes § 211B.35. If the Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minnesota Statutes § 211B.34, subdivision 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: October 28, 2008

s/ Steve M. Mihalchick  
STEVE M. MIHALCHICK  
Administrative Law Judge

## **MEMORANDUM**

John Swon alleges that Respondent Minnesota DFL violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material concerning Jan Schneider, who is running for election in House District 41B. Swon maintains that Respondent disseminated two pieces of literature which contain false statements. The first piece states that “Schneider supports expanding “voucher-like” tax credits to send students to private schools – just the wrong answer for our public schools.” The piece of literature cites “Minnesota Sun Newspapers, 11/10/2005” as the source of the statement. Complainant Swon asserts that the citation to the Minnesota Sun Newspaper is incorrect.

The second piece of literature states that “Schneider wants to reduce requirements that insurance companies provide Minnesotans with basic coverage for critical needs like cancer screenings, maternity care and mental health care.” The piece cites a League of Women Voters Debate, which occurred on September 27, 2008 (“LWV Debate, 9/27/08”) as the source of the statement. Complainant asserts that candidate Schneider never made any such claim during the debate.

Minn. Stat. § 211B.06, subd. 1, prohibits intentional participation:

...[i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political

character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

To be found to have violated this section, a person must intentionally participate in the preparation, dissemination or broadcast of false campaign material that the person knows is false or communicates with reckless disregard of whether it is false.

The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.<sup>1</sup> Based on this standard, the Complainant has the burden at the hearing to show by clear and convincing evidence that the Respondents prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove Respondent “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.<sup>2</sup>

For purposes of a prima facie determination, the Complainant must detail the factual basis to support a claim that the violation of law has occurred.<sup>3</sup> “Prima facie” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”<sup>4</sup> “Prima facie evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”<sup>5</sup> In determining whether a campaign complaint sets forth a prima facie violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

The Administrative Law Judge finds that the Complainant has alleged a prima facie violation of Minn. Stat. § 211B.06 against Respondents. This matter will proceed to a probable cause hearing as scheduled by this Order.

S. M. M.

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<sup>1</sup> 376 U.S. 254, 279-80 (1964).

<sup>2</sup> *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), rev. denied (Minn. 2006).

<sup>3</sup> Minn. Stat. § 211B.32, subd. 3.

<sup>4</sup> *Black's Law Dictionary* 1228 (8<sup>th</sup> ed. 2004).

<sup>5</sup> *Id.* at 598.